United Nations

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 982

Case No. 1066: HERNANDEZ-CORREA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, First Vice-President, presiding; Mr. Julio Barboza, Second Vice-President; Mr. Victor Yenyi Olungu;

Whereas at the request of Diana Hernandez-Correa, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 November 1998 and 28 February 1999 the time limit for the filing of an application with the Tribunal;

Whereas, on 18 February 1999, the Applicant filed an application containing pleas which read, in part, as follows:

"**II. Pleas**

7. With respect to competence and procedure, the Applicant respectfully requests the Tribunal:

...

(c) *To decide* to hold oral proceedings on the present application in accordance with article 8 of its Statute and chapter IV of its Rules; and

(d) *To order* the Respondent to produce the relevant minutes of the Appointment and Placement Committee's deliberations concerning the posts to which the Applicant applied or for which she had been found eligible.

8. On the merits ...

(a) *To rescind* the decision of the Secretary-General based on the recommendation of the Joint Appeals Board to make no award nor take any action in the Applicant's case;

(b) *To find and rule* that the decision of the Respondent to abolish the Applicant's post, not to place the Applicant in her former job or in another post in spite of numerous vacancies and to separate her from service was motivated by prejudice and procedurally flawed;

(c) *To find and rule* that the Joint Appeals Board erred as a matter of law and fact in finding that the Respondent's decision to separate the Applicant from service was not proven to be improper;

(d) *To find and rule* that the Applicant's career with UNICEF has been adversely affected by the intrusion of discriminatory and prejudicial treatment and that her reputation and financial well being have consequently been damaged;

(e) *To order* that the Applicant be reinstated at the earliest opportunity with retroactive effect from 31 July 1996;

(f) *To award* the Applicant appropriate compensation in the amount of three years' net base pay for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;

(g) *To* fix pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case;

(h) *To award* the Applicant as costs, the sum of $7,500.00 in legal fees and $500.00 in expenses and disbursements."

Whereas the Respondent filed his answer on 7 October 1999;

Whereas the Applicant filed written observations on 18 May 2000;

Whereas, on 13 July 2000, the Tribunal decided that no oral proceedings would be held in the case;

Whereas, on 17 July 2000, the Tribunal requested the Respondent to provide it with a certain document;

Whereas, on 21 July 2000, the Respondent submitted the document requested by the Tribunal;

Whereas, on 7 August 2000, the Tribunal put questions to the Respondent;

Whereas, on 8 August 2000, the Tribunal informed the parties that it had decided to adjourn consideration of the case until its next session;

Whereas, on 23 August 2000, the Respondent provided answers to the questions put by the Tribunal on 7 August 2000;

Whereas, on 11 October 2000, the Applicant commented on the answers submitted by the Respondent on 23 July 2000;

Whereas, on 1 November 2000, the Respondent submitted additional documents;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 24 August 1987, on a short-term contract at the G-3 level, as a Recruitment Clerk. On 31 October 1987, her functional title was changed to Secretary and her short-term appointment extended. On 24 February 1998, her short-term appointment was converted to a fixed-term appointment and again extended. On 1 June 1989, the Applicant was promoted to the G-4 level. Her appointment was extended several times, until 31 July 1996, when she was separated from service.

On 10 November 1995, the Applicant was informed by the Director, Programme Division, that her contract would be extended through 31 July 1996. On 26 January 1996, the Director, Programme Division, informed the Applicant that the Budget Planning and Review Committee had recommended that her G-4 post be abolished, that he expected the Executive Board to accept this recommendation, and that her contract would not be renewed beyond 31 July 1996. He also informed

her that her name would be placed on a roster for review against suitable available posts, encouraged her to apply for vacant posts, and advised her that if she was not successful, she would be separated in accordance with the applicable rules and regulations.

Between January and July 1996, the Applicant was considered for 13 posts identified by UNICEF and for four higher level posts for which she had applied herself. She was not selected for any of these posts.

On 13 May 1996, the review by the Selection Advisory Panel noted that one post (Information Assistant, G-6 level) required a writing and language skill test. The Applicant took the test and was rated as average by the Supervisor of the post, who reported that the Applicant "was not ready to take up the additional functions required in this G-6 post, at this time".

On 14 June 1996, all UNICEF staff at Headquarters were notified that all General Service staff separated from service upon abolition of their posts would be allowed to apply for future vacant posts as internal applicants for a maximum period of one year from the date of separation.

On 17 July 1996, the Applicant submitted a request for review of the decision "aimed at terminating [her] service ... with effect from 31 July 1996". On 19 July 1996, she requested the Joint Appeals Board (JAB) to suspend action (i) as to her separation from service, and (ii) as to her non-selection for the G-6 post. On 30 July 1996, the JAB recommended that "nothing be done by the Secretary-General to complete the termination process until after the substance of the case has been dealt with". On 31 July 1996, the Under-Secretary-General for Management conveyed to the Applicant the decision of the Secretary-General not to accept the JAB's recommendation.

On 16 August 1996, the Applicant lodged an appeal on the merits with the JAB. The JAB submitted its report on 14 April 1998. Its considerations and recommendation read as follows:

"*Considerations*

...

14. It found that [the] Appellant's contentions that she had been 'targeted', in part, for staff union activities, and that UNICEF had employed subterfuge to terminate her appointment were charges of prejudice or improper motivation. The Panel was aware that the Administrative Tribunal has consistently held, since its Judgement No. 93 (*Cooperman*)

that the burden of proving prejudice or improper motivation rests with the Appellant. The Panel could find no evidence provided by [the] Appellant to prove these allegations.

15. Similarly, the Panel found no substantiation to the charge that the manner in which [the] Appellant had been tested for the G-6 level post was discriminatory.

16. The Panel decided that the two issues it needed to resolve were (a) whether or not [the] Appellant had a legitimate claim to the upgraded G-6 post, and (b) whether she had received full and fair consideration for other vacancies. …

17. As for the second issue, the Panel felt that the relevant bases for its review were the text of staff regulation 4.4 and UNAT [United Nations Administrative Tribunal] Judgements No. 362 (*Williamson*) and No. 679 (*Fagan*). While the meaning and intent of these are quite clear, the Panel noted that they are not as categorical with respect to the issues of seniority and of precedence of fixed-term over short-term, as the text of staff rule 109.1 (c) (i) on the precedence of permanent and probationary appointees, and even that rule allows for judgement based on relative competence. The members of the Panel recalled that in placing any person on a post that some weight must be given to the judgement of the supervisor responsible for the work of the unit. Before proceeding further, it decided it needed information on the actual filling of the vacant G-4 post by UNICEF.

…

19. Having reviewed the classification documents for [the] Appellant's G-4 post and the post classified at the G-6 level, the Panel was satisfied that the latter [G-6 level post] was a new and different post. It could find no evidence that there was a procedural defect in the creation and classification of the post. Similarly, recalling that it was not called upon to substitute its judgement for that of the Appointment and Placement Committee, the Panel could find no evidence of a procedural defect in the choice of another staff member for the post.

20. Finally, the Panel concluded that there was no evidence that [the] Appellant had not received full and fair consideration for the various G-4 posts for which [the] Appellant was qualified. It was reinforced in this judgement by a review of the staff members actually chosen, all of whom were serious and/or endangered candidates. In sum, the Panel came to the conclusion that [the] Appellant's separation was a result of arithmetic, i.e. if there are 'n' available posts and 'x' qualified candidates and 'x' is larger than 'n', then it will not be possible to place (x-n) staff members.

Recommendation

21. The Panel makes no recommendation with respect to this appeal."

On 27 April 1998, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her that the Secretary-General had taken note that the Panel made no recommendation with respect to her appeal, and accordingly, had decided to take no further action in her case.

On 18 February 1999, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to abolish the Applicant's post violated the letter and spirit of the UN Staff Regulations and Rules.

2. The Respondent failed to meet its obligation to demonstrate that the Applicant could not have filled any of the vacant posts at her level which were used to place temporary staff or those with less seniority and therefore the Respondent failed to apply in good faith the established policies for placement of staff in abolished posts with respect to the Applicant. The abolition of the Applicant's post was a subterfuge for her subsequent non-renewal and in effect constituted an unjustified termination of her employment.

3. The procedure used in considering the Applicant's candidacy for her own post as well as for other suitable posts was arbitrary and unfair and failed to comply with the standard of good faith required by the Tribunal.

4. The Applicant had a reasonable expectancy of renewal of her appointment based upon an examination of all the circumstances of her case.

Whereas the Respondent's principal contentions are:

1. The Applicant had no legal expectancy of renewal of her fixed-term appointment.

2. The decision to abolish the Applicant's post was properly taken and took account of the rights of staff serving on fixed-term appointments whose posts have been abolished.

3. The Respondent's actions were not discriminatory, nor were they vitiated by prejudice or any other extraneous factors.

4. The Applicant's request for the award of costs is without merit.

The Tribunal, having deliberated from 13 to 27 July 2000 in Geneva and from 8 to 21 November 2000 in New York, now pronounces the following judgement:

I. The first question to be examined by the Tribunal refers to the failure of the Administration to consider her for a permanent post after five years of service on fixed-term contracts, in accordance with General Assembly resolution 37/126, which provides that "staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment".

II. The Respondent alleges that the Applicant raised the issue for the first time in her application to the JAB in 1996, three years after having completed five years of continued service, and that consequently her plea was time barred. Moreover, the Respondent maintains that a staff member serving on a fixed-term appointment is not entitled to consideration for a career appointment when the functions of his or her post are not viewed by the Administration to be "of a continuing nature to a degree warranting a career appointment under General Assembly resolution 37/126".

III. In Judgement No. 632, *Mughir* (1993) the Tribunal held that "the precarious financial situation of *Development Forum* made it impossible for the Administration to view the Applicant's functions as being of a continuing nature to a degree warranting a career appointment under General Assembly resolution 37/126." In the present case, the Administration abolished the post of the Applicant and thus obviously did not consider its functions of a continuing nature. This argument also refutes the Applicant's allegation that UNICEF had converted support budget posts, like the one encumbered by the Applicant, into established posts. The Applicant bases her allegation on a memorandum of 12 February 1999, and a circular letter dated 15 March 1999 on the same subject addressed to all staff members, i.e. about three years after her separation. A careful reading of these documents - only one example of the ambiguous evidence presented by the Applicant - indicates that only 6 per cent of such posts were converted to "established". Clearly the post encumbered by the Applicant was not included in the 6 per cent, as it was abolished. Furthermore, the Applicant was

never placed against a core post during the entire period of her employment with UNICEF, including the three years during which she claims she should have been considered for a career appointment.

IV. The Tribunal turns now to the two main issues in the case. The first is whether the abolition of the Applicant's G-4 post and the creation of a new G-6 post, which combined some of the functions of the former as well as additional functions, in fact created a new and different post demanding different skills. The second issue is whether the Administration made reasonable efforts to place the Applicant in a post equivalent to the one she occupied. The affirmative answer to the first question would imply that the Applicant was wronged by the Administration, because the motivation for abolishing one post and creating another would have been improper, and the abolition an excuse to terminate the Applicant's employment. If the answer to the second question is in the negative, the Administration would not have respected the priority consideration due to her, as she indeed claims.

V. As to the first question, the Applicant claims that the functions of the new post were similar to those of the G-4 post. She also claims that she had already been performing these and most of the supposedly higher level functions of the new post new functions for several years and it was precisely because of that fact that she had been asking for the reclassification of the G-4 post.

However, in the view of the Tribunal, the Applicant did not manage to prove her point. In the first place, the establishment of the new post two levels higher indicates that the Administration was seeking a higher degree of performance requiring a greater degree of initiative, superior decision-making capacity and additional language skills. The Applicant's claim as to having been already performing most of the functions of the G-6 post is not supported by the evidence. At any rate, the excerpts of the minutes of the APC meeting held on 11 June 1996, reviewing candidates for the G-6 post indicate that the Applicant was considered average in English and weak in Spanish written expression. The Applicant's supervisor agreed with this assessment. She recognized the Applicant's "good performance in her current post", however, she felt, "that while she ha[d] potential for advancement to a G-5 level post she was not ready to take up the additional functions required in this G-6 post, at this time."

VI. The Tribunal's function is not to substitute its judgement for that of the APC. Rather, the Tribunal's function is to determine whether there was a violation of due process, or whether the decision of the APC was arbitrary, tainted by prejudice, procedurally defective or suffering from some other important defect. The *onus probandi* is, naturally, on the Applicant, who has made some unsubstantiated charges including prejudice against women, and resentment against her due to her position as a union representative. However, she has not managed to produce supporting evidence. The Tribunal must therefore reject this claim.

VII. As to the second question, i.e. whether the Respondent made reasonable efforts to place the Applicant in a new post, the Tribunal is satisfied that the Administration considered the Applicant for thirteen positions - a considerable number. The Applicant herself applied for four other posts - a total of seventeen.

The Tribunal notes that the Applicant did not have high priority. Permanent staff members in abolished posts were to be considered first, then staff members on fixed-term contracts in abolished posts. Moreover, many candidates for the posts for which the Applicant could be considered were staff members with priority, equal to or higher than the Applicant's. Therefore, the arithmetic reasoning of the JAB (a number of qualified candidates larger than the number of available posts will exclude some candidates) turns out to be quite correct. Finally - and this is a decisive consideration - priorities are relative, so that some candidates with lesser priority may be selected if the selection panel is convinced that he or she has better qualifications.

Unless the selection process is vitiated by arbitrariness, a lack of due process, or improper motivation, the Tribunal will not interfere with the selection process. In the present case, the Tribunal finds no reason to do so.

VIII. For all of the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Mayer GABAY
First Vice-President, presiding

Julio BARBOZA
Second Vice-President

Victor YENYI OLUNGU
Member

New York 21 November 2000

Maritza STRUYVENBERG
Executive Secretary